

LETTER TO THE PRESIDENT FROM THE ATTORNEY
GENERAL DISCUSSING TYPICAL TERMINATION PRO-
VISIONS FOUND IN WAR POWERS STATUTES

September 1, 1945.

The President,
The White House.

My Dear Mr. President: I have the honor to reply to your request for my views concerning the present status of emergency legislation relating to the wartime powers of the Executive.

I have caused to be gathered from the various executive agencies lists of statutes upon which they have relied in exercising their wartime functions, and I have in addition caused an independent search to be made. The compilation which I attach is believed to contain the principal statutory sources of wartime executive authority. It has been arranged in two ways: (a) so as to list these statutes with relation to the agencies exercising the powers conferred, and (b) so as to list them according to the time and method of their termination.

I trust that the attached compilation will be of assistance to you and to the Congress in deciding which of the wartime statutes and agencies should be terminated and which should for a longer or shorter time be continued. In the same connection, I think it would be appropriate for me to bring to your attention certain general considerations. I must do so, however, in terms of broad generalization, inasmuch as each of these statutes has its own history and its own purpose and intent. Any question as to the termination of an individual statute must therefore be determined in the light of the statute's history and purpose, and in the light also of the factual conditions prevailing at the time the question is raised. Nevertheless, subject to what has just been said, I think it is possible to reach certain general conclusions.

First of all, it should be borne in mind that the war powers of the President and the Congress do not automatically cease upon the termination of actual fighting. As the Supreme Court said in Stewart v. Kahn, 11 Wall. 493, at 507: "[The war power] * * * is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." See also Hamilton v. Kentucky Distilleries Co., 251 U.S. 146.

The broad basis of governmental power on which the various emergency and wartime statutes rest cannot, therefore, be said to have been terminated by recent developments, including the unconditional surrender of our enemies. Questions do arise at the present stage, however, with regard to the time which the Congress has specified in individual statutes as being the termination date of the powers therein conferred. As will appear in the attached compilation, certain of the wartime statutes are made effective only "in time of war," or "during the present war," or "for the duration of the war." Still other expressions may be found of similar character.

Speaking generally, I believe that statutes of the type just mentioned should be considered as effective until a formal state of peace has been restored, unless some earlier termination date is made effective by

appropriate governmental action. In Hamilton v. Kentucky Distilleries Co., supra, Mr. Justice Brandeis, speaking for the Court said: "In the absence of specific provisions to the contrary, the period of war has been held to extend to the ratification of the treaty of peace or the proclamation of peace." Again, in Commercial Cable Co., v. Burleson, 255 Fed. 99, 104, Judge Learned Hand rejected the contention that certain wartime powers conferred on the President in the First World War had terminated with the Armistice of November 11, 1918, and added: "Even if I were to assume that the power were only coextensive with a state of war, a state of war still existed. It is the treaty which terminates the war." See also Kahn v. Anderson, 255 U. S. 1, 10; Ware v. Hylton, 3 Dall. 199, 236; 22 Op. A. G. 190 (1898). It is perhaps unnecessary to add that the Congress can at any time, in response to changed conditions, repeal or amend any wartime statute or group of statutes.

I turn to another group of statutes: those which are to be terminated "upon the cessation of hostilities, as proclaimed by the President." Speaking once more in general terms, I believe that a provision of this type should be interpreted to refer to a formal proclamation, issued after you have determined that the facts warrant such action. Any less formal action on your part would not in my opinion be given by the courts the legal effect of terminating a wartime statute, in the absence of proof in the document itself that it was your intention so to do. See Hamilton v. Kentucky Distilleries Co., supra.

The same reasoning would seem to apply to statutes which remain in effect until the termination of the limited emergency, declared by President Roosevelt on September 8, 1939, or of the unlimited emergency declared by him on May 27, 1941. When in your judgment it is necessary and proper that one or both of those states of emergency be terminated, you will doubtless wish to issue a formal proclamation or proclamations to that effect. Prior to that time, informal action would not, in my opinion, be construed by the courts, under the reasoning of the Hamilton case, as having brought those states of emergency to an end.

Respectfully yours,

(Signed) TOM C. CLARK
Attorney General

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